U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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[redacted]

DATE: APR 2 7 2012 OFFICE: NEBRASKA SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a physician practicing internal medicine. At the time he filed the petition, the petitioner was chief of staff and staff physician at [redacted] The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a statement from counsel.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on July 1, 2010. In an introductory statement, counsel stated: "According to renowned leaders in the field, [the petitioner] is established as a foremost expert in the field of internal medicine. This is evidenced by his publications and presentations, leading and critical roles, distinctions and memberships in medical societies."

Counsel asserted that the petitioner would be unable to obtain a labor certification, because his position requires a combination of skills and special knowledge and abilities. Counsel cited Department of Labor regulations and a decision by the Board of Alien Labor Certification Appeals

(BALCA) to support the claim that a labor certification application for the petitioner would likely be denied as "unduly restrictive."

The inability to obtain a labor certification would not, by itself, be a deciding factor in the petitioner's favor. The wording of the statute makes it clear that exemption from the job offer requirement rests on the national interest, not on an alien's inability to obtain a labor certification. Even so, the cited materials do not strongly support counsel's assertions. In the cited administrative decision, BALCA ruled:

> This Panel finds the unqualified term "artistic ability" to be vague and subjective without any guidelines or criteria available to determine whether an applicant is qualified for the position. Accordingly, the special requirement of artistic ability is unduly restrictive under §656.21(b)(2), because the Employer has rejected otherwise qualified U.S. workers based on this vague, subjective requirement.

Michael Graves Architect, 89-INA-131, 1990 WL 300112 (Bd. Alien Lab. Cert. App. Feb. 21, 1990). Counsel compared the vaguely-defined "artistic ability" in *Michael Graves* to the present petitioner's "expertise [in] clinical and novel research, as it pertains to internal medicine." In *Michael Graves*, BALCA's objection was that "artistic ability" is subjective and difficult to "quantify . . . in terms of length of training or experience." *Id.* Counsel did not show that the same can be said for medical expertise. The outcome of a medical procedure, or the results of a research study, rest on measurable and objective factors, rather than the individual esthetic sensibilities of an artist or architect.

Counsel stated that a job requiring a combination of duties is not amenable to labor certification, because "the Department of Labor stipulates that the employer describe its job opportunity without "unduly restrictive" requirements [22 C.F.R. sec. 656.21(b)(2)]." The cited regulation actually appears in chapter 20, not 22, of the Code of Federal Regulations. The regulation contains no flat prohibition relating to a combination of duties. Rather, 20 C.F.R. § 656.21(b)(2)(ii) reads:

> If the job opportunity involves a combination of duties, for example engineer-pilot, the employer must document that it has normally employed persons for that combination of duties and/or workers customarily perform the combination of duties in the area of intended employment, and or the combination job opportunity is based on a business necessity.

The above regulation clearly allows, under certain conditions, labor certification for a position that "involves a combination of duties." Counsel cited no BALCA decision or other authoritative source to show that the Department of Labor has categorically disallowed labor certification for positions that combine the duties of a physician and those of a researcher.

Counsel contended that the petitioner, having "**been hired to serve in leading roles at some of the country's and the world's top medical institutions . . . was selected after nationwide searches in**

competition with extremely highly qualified peers because he is regarded as superior . . . and because he is able to achieve results that are far beyond the norm" (counsel's emphasis).

The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). It is by no means a settled or undisputed fact that the petitioner has had "leading roles" at leading medical institutions, or that those institutions hired him on the basis of his reputation as a superior physician/researcher.

Counsel asserted that the petitioner "has implemented" "several new medical programs . . . to improve levels of hospital efficiency and patient care offered at various hospitals. Please note that not only have several of these programs been widely implemented in different parts of the country, but the work has resulted in publication and citation in very prominent medical journals." Counsel did not identify or describe these "new medical programs," but rather asserted that evidence regarding them is to be found somewhere in the nine folders that comprise the record of proceeding. There is no comprehensive index to show the location of individual exhibits among the thousands of pages of documents submitted.

Counsel claimed that the record shows "the indispensable role that [the petitioner] has played at several very prominent institutions." The positions the petitioner has held have all been residencies, fellowships or other temporary training assignments, indicating that each of the employers considered the petitioner's professional training to be incomplete. Furthermore, there exists no blanket waiver based on the reputation of a given employer. Whatever an institution's standing in a particular field, an alien's employment there is not *prima facie* evidence of eligibility for the waiver. One's impact and influence on the field, rather than where that impact originates, is the chief consideration.

With respect to the petitioner's published work, the petitioner submitted copies of several case studies, in which the petitioner reported the diagnosis and treatment of individual patients, and an unpaginated publisher's proof of an article that reported the results of "A Survey of the Program Directors in Internal Medicine Residency Programs in the United States." None of these articles reported the outcome of medical research studies.

The petitioner submitted several witness letters containing high praise for the petitioner's achievements but few details about them. [redacted] stated that the petitioner "is regarded as one of the most talented educators, researchers and internal medicine experts who has risen to the very top of his specialty." [redacted] credited the petitioner with "significant contributions in his field," but did not identify what those contributions were. [redacted] made a number of superlative claims, such as the assertion that "[c]ertification by the Board of Internal Medicine is one of the most difficult distinctions to earn in all of medicine," but cited no independent, documentary evidence to support those claims.

[redacted] stated that the petitioner's "publication of extraordinary clinical cases . . . have made [the petitioner] a leader in his field." [redacted]

[redacted] also cited "an extreme shortage of Physician-Scientists." With respect to the claimed shortage, Congress addressed the issue of physician shortages with the passage of section 203(b)(2)(B)(ii) of the Act, which spells out a procedure by which a physician in a shortage area can qualify for the waiver. The implementing regulations for this procedure appear at 8 C.F.R. § 245.12. The petitioner did not submit the evidence that those regulations require, relying instead on the general assertion of a shortage in his specialty. Outside of the statutorily specified provisions identified above, a shortage of workers is grounds for obtaining, rather than waiving, a labor certification. *See NYSDOT*, 22 I&N Dec. at 218.

[redacted] of George Mason University, who has "known [the petitioner] for many years," stated: "A review of his resume indicates that his academic research contributions have been well received by the professional medical community." [redacted] does not indicate how this information would be evident from "review of [the petitioner's] resume."

[redacted] stated that the petitioner's "research is well respected" and that he "holds a reputation as an excellent physician-scientist," but provided few details except to note that, at [redacted] he served as a clinical research coordinator for "multiple studies . . . focused on developing safe medications for treating victims of schizophrenia, acute mania and bipolar disorders." The disorders so named are all psychiatric disorders. The petitioner has not shown that disorders fall within the purview of internal medicine, the area of practice through which the petitioner claims he will serve the national interest.

[redacted] stated that the petitioner "has made an extraordinary name for himself, particularly because of the pioneering work that he has performed," but [redacted] did not provide any information about the petitioner's work except to state that it was "in the field of medicine and gastroenterology."

[redacted] University School of Medicine, stated:

> It is . . . notable that [the petitioner] has been awarded several travel grants to attend the annual meetings of such preeminent organizations as the American College of Physicians . . . , the American College of Gastroenterology, the Association of Program Directors of Internal Medicine (for $2,000.00) and the digestive Disease Week, which is the largest and most important gathering of gastroenterologists in the world. The award of travel grants is one of the highest honors for a physician-scientist. . . . That [the petitioner] has been awarded such travel grants is objective evidence of his superior reputation as a physician-scientist.

The petitioner has not submitted evidence to show that a travel grant "is one of the highest honors for a physician-scientist." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

On January 24, 2011, the director issued a request for evidence, instructing the petitioner to "submit documentary evidence to establish . . . a past record of specific prior achievement that justifies projections of future benefit to the national interest."

In response, counsel stated that the petitioner "is heralded as an extraordinary clinician in his field." Counsel stated that the petitioner's "innovative work regarding a *Clostridium difficile* PCR-based test in the diagnosis of a serious life-threatening infection has been implemented by many U.S. hospitals." The record does not show that the petitioner created the PCR-based test, or conceived of the idea of using the test to diagnose *C. difficile*. Rather, the petitioner compared the effectiveness of different testing methods. Therefore, the record does not show that the petitioner is responsible for the widespread use of the PCR-based test for *C. difficile* diagnosis.

The petitioner submitted no new witness letters, but did submit copies of several letters originally submitted in support of an earlier (denied) petition to classify the petitioner as an alien of extraordinary ability in the sciences under section 203(b)(1)(A) of the Act. Overall, the letters are similar in tone and content to the letters submitted with the initial filing of the present petition, with witnesses selecting various episodes from the petitioner's career and pronouncing them to be major accomplishments in modern medicine. For example, [redacted] described "one research project performed by [the petitioner] that has gained phenomenal commendation in the medical community. He designed a study to look at patients undergoing endoscopic procedure and assess the risk of bleeding." [redacted] did not describe, and the record does not show, the nature or extent of the claimed "phenomenal commendation in the medical community." Numerous other witnesses claimed that the petitioner has reached the top of his profession, but the record does not show that this ascent has left any documentary evidence (as opposed to letters from witnesses selected by the petitioner and written specifically in support of visa petitions on his behalf).

The petitioner submits copies of articles by other researchers, containing citations to the petitioner's past work. Counsel asserted: "The reliance on his work by clinical practitioners throughout the country is evidence of its trailblazing and landmark nature."

The petitioner submits evidence of eight citations of his published work. The petitioner submitted nothing to show that this rate of citation was out of the ordinary in his specialty.

The director denied the petition on April 27, 2011. The director acknowledged the intrinsic merit of the petitioner's occupation, but found that the petitioner had not established that its national scope. The director noted that the beneficiary had five basic duties – "Patient care," "Research," "Administrative duties," "Mentoring young physicians" and "Teaching" – and found that "only research duties would potentially qualify as national in scope." The director also found that the petitioner has not shown that his individual impact in his field was sufficient to warrant the national interest waiver. The director found the petitioner's citation history to be minimal, and found that the petitioner had not shown his evidence to demonstrate influence in the field.

On appeal, counsel asserts that "the impact of [the petitioner's] work has spread beyond his hospital community," and disputes the director's finding that the petitioner's work lacks national scope. The AAO agrees with counsel that the petitioner has established that his research, published in journals and otherwise disseminated through professional gatherings, is national rather than local in scope. The director's observation that the petitioner has several local duties does not negate the national scope of the petitioner's research work. The AAO will, therefore, withdraw this element of the director's determination.

Less persuasive, however, is counsel's contention that the petitioner's work has "had a significant national influence in improving healthcare." The petitioner has exhaustively documented his professional career, but the record offers no objective support for witnesses' claims that the petitioner has risen to "the top" of his profession.

The Board of Immigration Appeals (BIA) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The BIA also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

The opinions of experts in the field are not without weight and have received consideration above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as above, evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, 502 n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Here, many of the witnesses have made claims that purport to be matters of fact rather than expert opinion, regarding objectively verifiable matters that the record fails to corroborate. Many of these claims are so exaggerated that their credibility is in serious doubt. For instance, a number of witnesses have contended that the petitioner has achieved a national or international reputation as one of the best in his field, but the witnesses have rarely provided many details about this reputation. The AAO notes that the petitioner had not yet completed his medical training when the witnesses wrote their letters. Many of the witnesses have strong credentials themselves, but these qualifications merely serve to illustrate the gulf of experience and accomplishment between those witnesses and the petitioner. The AAO agrees with the director's finding that the objective evidence of record simply fails to offer any credible support for the claims in the witnesses' letters.

Counsel contends that the labor certification process would interrupt the petitioner's work in the United States, "potentially on a permanent basis." This is an unsupported assumption. Counsel repeats the claim that the petitioner's combination of clinical and research duties is not suitable for labor certification, even though the regulation that counsel previously cited to support that claim actually shows that the Department of Labor will readily consider a combination of duties under appropriate circumstances.

The petitioner's combined research and clinical positions have all been admittedly temporary training assignments. The petitioner has not documented any formal offer of permanent employment from [redacted] and no indication that the labor certification requirement has prevented such an offer being extended.

In terms of permanent positions involving both research and clinical medicine, many of the petitioner's witnesses hold medical school faculty positions that involve exactly that combination. As the former Immigration and Naturalization Service (now USCIS) noted in *NYSDOT*, the Department of Labor (DOL) has a separate labor certification procedure for college and university teaching positions. *Id.* at 218 n.4. The specific regulations have since changed, but the current DOL regulation can be found at 20 C.F.R. § 656.18.

Counsel contends that the petitioner has submitted "clear evidence" of "great contributions to the field through both his research work as well as clinical abilities." The petitioner has submitted ample evidence that he has been active as a researcher, a physician, and an instructor of less experienced medical students. The record does not, however, contain "clear evidence" of the importance of the petitioner's contributions. The witness letters contain high praise of the petitioner's work, but for reasons already explained, those letters are of highly dubious credibility.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.